93-272

No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATRICIA K. SULCER,

Petitioner,

v.

THE CITIZENS BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, JOHN A. BARRETT, JR., JAMES YOUNG, BOB DAVIS, AND HILTON MELOT.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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178 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal district courts have jurisdiction over a claim brought under the Indian Civil Rights Act by a non-Indian employee if the tribal remedies are completely foreclosed due to claimed sovereign immunity by tribal officials.

2. Whether, the ICRA or other enacted federal statutes or regulations apply to non-Indian or Indian employees of the tribe and should the federal courts provide a forum after the tribal forum refuses to consider the claim.

3. Whether the Indian Civil Rights Act, when adopted by the tribal constitution, affords equal access and equal protection to all Indian or non-Indian citizens of the United States in federal district court if the tribal court forum is completely foreclosed due to claimed sovereign immunity by tribal officials.

II

PARTIES TO THE PROCEEDING

The Parties to the proceeding in the Tenth Circuit are those in the caption, the Petitioner, Patricia K. Sulcer, and the following defendants below and Respondents to this petition (listed as they appeared in the style of the case):

Citizen Band Potawatomie Indian Tribe, (The Tribe)

John A. Barrett, Jr.

James Young

Bob Davis

Hilton Melot

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Patricia K. Sulcer (Ms. Sulcer) requests that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in this action on February 18, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals[1] (Pet. App. A-1-12) is unreported. The opinion of the District Court (Pet. App. A12-20) is also unreported. The opinion of the Tribal Supreme Court (Pet. App. A-21-64) is reported at 17 Ind.L.Rptr. 6138 (C.B. Pot. Sup Ct. 1990).

JURISDICTION

The opinion of the Court of Appeals (Pet. App. A-1-12) was entered on February 18, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). An extension of time was granted on May 24, 1993 to file a Petition for Writ of Certiorari; an additional extension was granted on June 24, 1993 allowing Petitioner until July 8, 1993 to complete and file her Petition.

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[1] The opinion of the Court of Appeals was unpublished and without precedential value.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United State Constitution, Amendment V:

No person shall ... be deprived of life, liberty, or property, without due process of law ....

25 U.S.C. § 450(h), Indian Self-Determination

Contracts and grants with tribal organizations ... shall include provision to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

28 U.S.C. § 1331, Federal question,

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1343(a)(4), Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action

authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the rights to vote.

25 U.S.C. § 1301(1)(2)(3), Definitions

For purposes of this subchapter, the term-

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction

over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense;

25 U.S.C. § 1302 (8), Constitutional rights

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

25 U.S.C. § 450h (a)(1), Grants to tribal organizations or tribes

(a) Request by tribe for contract or grant by Secretary of the Interior for Improving, etc., tribal governmental, contracting, and program planning activities.

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to sections 13 and 52a of this title, and any Act subsequent thereto) to contract with or make a grant or grants to tribal organization for-

(1) the strengthening or improvement of

tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

25 U.S.C. § 450f(a), Contracts by Secretary of the Interior with tribal organizations

(a) Request by tribe for contract by Secretary to plan, conduct and administer education, etc., programs; refusal of request

The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in sections 452 to 457 of the title, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the

benefit of Indians under sections 13 and 52a of this title, and any Act subsequent thereto: Provided, however, That the Secretary may initially decline to enter in to any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract,

(E) adequately trained personnel, or (F) other necessary components of contract performance.

25 CFR Ch. 1, § 271.15(a), Criteria for declining to contract

(a) The Commissioner may decline to contract only for the specific causes given in paragraph (b) of this section. The burden of proof is on the Commissioner to demonstrate, through substantial evidence, that one of the specific grounds for declination exists and that, therefore, the application must be declined.

25 CFR Ch. 1, § 271.15(c)(5)(i), Criteria for declining to contract

(c) In arriving at his finding, the Commissioner shall consider whether the tribal organization would be deficient in performance under the contract with respect to the factors listed in this paragraph.

(5) Adequacy of trained personnel. The adequacy of trained personnel available to the tribal organization to carry out the

proposed contract will be presumed if any of the following conditions exist:

(i) If the tribal organization has a personnel system that prescribes minimum occupational qualifications standards which insure equal access to all qualified tribal members; procedures for the selection of personnel on the basis of such standards; and the personnel to be used under the proposed contract are to be employed under the personnel system.

25 CFR Ch. 1, § 271.15(c)(6)(i)(A), Criteria for declining to contract

(c) In arriving at his finding, the Commissioner shall consider whether the tribal organization would be deficient in performance under the contract with respect to the factors listed in this paragraph.

(6) Other necessary components of contract performance. (i) All other necessary components of contract performance will be deemed to be met unless a tribal

organization:

(A) Does not agree to develop an adequate personnel system that provides selection standards which insure equal access to all qualified tribal members;

STATEMENT OF THE CASE

Petitioner, Patricia K. Sulcer, was an employee in good standing for six (6) years working as the Director of the communications department as well as editor of the tribal newspaper.[2] The Tribe had adopted a tribal constitution, a personnel policy manual and various laws governing the operation of tribal government all of which applied to Ms. Sulcer's employment.

Without any notice or opportunity to be heard, the members of the tribal business committee composed of the individual respondents, voted to terminate Ms. Sulcer's employment immediately without any just cause. This meeting was held without notice, agenda or any opportunity to respond, all in contravention of the tribal constitution and

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[2] Ms. Sulcer was editor of the tribal newspaper HOW-NI-KAN which had received numerous awards from the Native American Press Association through the efforts of her work. (Pet. App. A-133)

the adopted personnel policy manual and related Tribal ordinances.[3]

The proceedings below. Ms. Sulcer's action commenced in tribal court against the four individual members of the tribal business committee in their individual capacities. Ms. Sulcer sought injunctive relief as well as damages for the alleged improper conduct by the individual respondents allegedly motivated by personal interests rather than tribal interest. The individual respondents filed a Motion to Dismiss based upon the doctrine of "Sovereign Immunity". The tribal court sustained the motion and dismissed the action. Ms. Sulcer appealed to the Tribal Supreme Court which limited their review to the issue of sovereign immunity. The divided

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[3] Tribal resolution No. 84-37 prohibited members at Business Committee from involving themselves in Staff Administration. Tribal resolution No. 84-93 brought the tribal Personnel Policy into conformity with federal personnel policies (prohibited termination based upon 'Ex Post Facto' violations).

Tribal Supreme Court held without benefit of an evidentiary hearing that the individual respondents were immune from suit. Ms. Sulcer exhausted her tribal remedies having been denied a forum to present her claims under the Indian Civil Rights Act.(ICRA).

The present action was brought in Federal District Court against the individual respondents again alleging that the individuals acted beyond the scope of their authority as business committee members as well as in violation of the Indian Civil Rights Act (ICRA) and rights contained in the United States Constitution, First and Fifth Amendments. Ms. Sulcer alleged that Federal court jurisdiction was based upon 28 U.S.C. § 1331, under deprivation of rights under the United States Constitution and the ICRA. Additional jurisdiction was also premised on 28 U.S.C. § 1343(a)(4) for deprivation of civil rights. Ms. Sulcer plead exhaustion of Tribal remedies and alleged denial of a forum

to be heard. The individual respondents again filed a motion to dismiss based upon the doctrine of sovereign immunity. Ms. Sulcer included the tribe as a defendant due to its position that sovereign immunity denied her a forum in which to proceed even against tribal officials under the ICRA.

The district court found that Ms. Sulcer could prove no set of facts which would provide jurisdiction to the court based upon the concept of sovereign immunity. (Pet. App. A-13, 19) Although, Ms. Sulcer a non-Indian, alleged the individual respondents acted outside the scope of their authority, the District court found that the action was inherently racial which precluded federal court jurisdiction.(Pet. App. A-15) The district court acknowledged Ms. Sulcer's claims that respondents acted outside their authority but relied upon the decision of the

tribal court as controlling.[4] Notice of appeal was filed on February 26, 1992. Jurisdiction of the Court of Appeals was brought pursuant to 28 U.S.C. § 1291.

The Tenth Circuit affirmed the district courts action on February 18, 1993. The Tenth Circuit court held that Ms. Sulcer's action was not cognizable under the ICRA against the tribe due to sovereign immunity. The court pointed out that the only federal remedy under the ICRA was a writ of habeas corpus. (Pet. App. A-5). Additionally, since Ms. Sulcer's action involved a matter of internal tribal affairs, the Tenth Circuit's narrow exception in Dry Creek Lodge, Inc. v. Arapahoe, Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) did not apply.

The Tenth Circuit rejected consideration of whether tribal court's refusal to consider

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[4] Ms. Sulcer alleged a conspiracy of the named individual defendants to deprive her of her employment and due process rights thereunder. (Pet. App. A-18)

Ms. Sulcer's claims against the individual respondents under the ICRA, exceeded the lawful limits of tribal civil subject-matter jurisdiction. (Pet. App. A-8)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict regarding the interpretation and extent a United States citizen (Indian or non-Indian) is protected by the Indian Civil Rights Act or the United States Constitution and federal statutes while employed by an Indian tribe. The Tenth Circuit has construed sovereign immunity to mean that tribal employees are afforded no constitutional or statutory protections against tribal officials. The enactment of the Indian Civil Rights Act is designed to protect citizens from being deprived of their constitutional and statutory rights to due process.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE EXTENT TO WHICH, INCONSISTENT WITH THE CONSTITUTION, INDIAN TRIBES CAN REFUSE A TRIBAL FORUM FOR CONSTITUTIONAL OR ICRA VIOLATIONS.

This case presents the important question of whether a remedy exists for violations of an employee's constitutionally guaranteed protections from the arbitrary and capricious actions of tribal officials under the cloak of sovereign immunity. The question left unanswered by this Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), is whether Indian tribes can deny to American citizens the broad constitutional rights of due process to which citizens, Indian or non-Indian, are entitled.

The indiscriminate use of the concept of sovereign immunity by tribal officials to insulate themselves from scrutiny for deprivations or violations of the basic tenants of constitutional protections of due process afforded both Indians and non-

Indians, under the Fifth Amendment or ICRA, demands that courts affix appropriate relief. See Bell v. Hood, 327 U.S. 678, 684 (1946).

The Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, did not waive sovereign immunity which tribes enjoy from suit. However, the tribes or its officials are clearly limited in their actions regarding certain basic tenants of constitutional freedoms enjoyed by all. The purpose of the ICRA is to provide protection for individuals "from arbitrary and unjust actions of tribal governments" Santa Clara, 436 U.S. at 61, or their officials. The forum is and should be tribal for redressing violations under the ICRA committed by tribal officials. However, sovereign immunity is being used to cloak tribal officials with absolute immunity even

in tribal courts.[4]

This Court established the criteria for review and determination of the extent of tribal court jurisdiction versus complete immunity in National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. 845 (1985).[5] In this instance the tribal court, district court, and the Tenth Circuit

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[4] Justice Pitchlynn of the Tribal Supreme Court in his dissenting opinion (Pet. App. A-59) addressed the issues raised by Ms. Sulcer:

> In order to accept the defense of the Appellees in this case, it would be necessary for this Court to assume that the Citizen Band Potawatomie Indian Tribe is by nature and temperament an arbitrary, capricious body which takes no cognizance of its own laws, policies or other official acts, and which may from day-to-day ignore or violate the same, by a simple majority vote of the Business Committee.
>
> Sovereign immunity cannot, however, be used to defend violation of or continuing conflict with the Constitution and By-laws of the Tribe . . . (Pet. App. A-59-60)

[5] This Court held that to invoke the jurisdiction of the federal district court, it is only necessary to raise a claim under federal law, which protects individual rights. 471 U.S. at 850, 851. Ms Sulcer believes that federal law prohibits the tribes from depriving non-Indians of constitutionally protected rights.

did not consider the enacted tribal constitution and its relevant provisions and limits on the conduct of tribal officials and their actions before deciding the tribe and its officials enjoy immunity from review regardless of their conduct.

The Tenth Circuit is correct when noting this Courts decision in Larson v. Domestic & Foreign Commerce Core, 337 U.S. 682, 695 (1949), that the tribe's immunity is unavailable to the committee members acting beyond their authority.[6] Although Ms. Sulcer alleges this exact fact, the concept of sovereign immunity as interpreted below, prevents the availability of any forum for deprivations under the ICRA or United States Constitution or federal statutes and regulations.

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[6] The Tenth Circuit's decision made no distinction regarding the actions of the individual respondents stating only that even if sovereign immunity is not available, no rights exists for Ms. Sulcer in federal court under the ICRA. (Pet. App. A-5).

Congress passed the ICRA reflecting its overriding interest to ensure certain constitutional rights for tribal members. This Courts opinion in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980) would be controlling, for the proposition tribal sovereignty is limited by the national government and does not authorize tribal officials to deprive Indians or non-Indians of rights protected by the ICRA.

The undisputed facts are that Ms. Sulcer did not have notice or any opportunity to be heard prior to or after her termination from tribal employment. The basic fundamental constitutional principal of notice and hearing, addressed in this Court's decision in Matthews v. Eldridge, 424 U.S. 319, 333 (1976), is lacking in Ms. Sulcer's removal from tribal employment even though such

action is specifically provided.[7] This position is mirrored by the Tribal Supreme Court in its first opinion.[8]

The Tenth Circuit's decision in this case is inconsistent with its published holding in White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984), where it acknowledges that the ICRA creates substantial rights which should be "vindicated through tribal forums which are obliged to apply the statute".

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[7] The tribal constitution provided under Article 16, Section 1(h) that due process shall not be denied. (Pet. App. A-97). The Tribal Personnel Policy Manual describes a provision for notice and an opportunity to be heard. (Pet. App. A-130). Should the Business Committee elect to interfere with Staff Administration their actions must comply with Article 18, Section 2. (Pet. App. A-98). None of which was provided to Ms. Sulcer.

[8] The Tribal Supreme Court in its first published opinion (this action was its second) stated in Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma, 15 I.L.R. 6007 (C.B. Pot. Sup. Ct., Feb. 17, 1988), that "the concept of due process entails fair treatment under law, a right to notice, and some opportunity to be heard". 15 I.L.R. at 6009. Although the due process is governed under tribal law.

728 F.2d at 1312.

Because of the varying interpretations of the limitations on tribal sovereign immunity and its application to tribal officials, this Court should review the decision of the Tenth Circuit Court of Appeals so that a uniform and consistent standard will be available regarding the tribal forums and application of the ICRA.

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION REGARDING THE PURPOSE OF THE ICRA AS TO WHETHER THE TRIBAL OFFICIALS CAN BE IMMUNE WITHIN THEIR OWN FORUMS.

The purpose of the adoption of the ICRA was, according to this Courts decision in Santa Clara v. Martinez, 436 U.S. 49 (1978), to:

> 'Secure for the American Indian the broad constitutional rights afforded to other Americans', and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments'. 436 U.S. at 61.

The confusion both in Tribal courts and District courts below stems from whether or

not the ICRA has any applicability when tribal officials or the tribal government itself claims immunity within the tribal forum. Such claim of immunity effectively defeats any viability of the ICRA.

This Court in National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. 845 (1985) noted the diminishing effect to the once unlimited power Indian tribes had over their members:

> Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. 471 U.S. at 851.

Respondents through the use of the concept of sovereign immunity essentially void any constitutional or statutory protections to which Ms. Sulcer is entitled under the United States Constitution or even under the Tribal

Constitution which incorporated the ICRA.[9]

Tribal members by Treaty enjoy the protections and guarantees afforded under the United States Constitution.[10] Additionally, they have the guarantees under the concept of self-determination and expect tribal forums to resolve their legal disputes. However, Ms. Sulcer, an employee of the tribe under the doctrine of sovereign immunity has no forum in which to pursue her claims, which if she had been employed by any public employer, especially the federal government,

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[9] United States Constitution, Amendment V, and the Tribal Constitution Article 16(h).(Pet. App. A-97).

[10] Tribal members have had the benefits and detriments of citizenship since 1861. See Treaty With Potawatomi, 1861, 12 Stats., 1191, Article 3 which provided for citizenship; hence, the name "Citizen Band"; also Treaty With Potawatomi, 1867, 15 Stats., 531, Article 6 and Article 8, expansion of citizenship to all tribal members.

would have had a cognizable claim to pursue.[11]

Ms. Sulcer charged the individual respondents with committing an unconstitutional act and acts in violation of the tribal personnel policy and procedure manual. According to this Court's decision in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) such charges are not protected by sovereign immunity. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) (This Courts general rule on whether suit is against government).

The Ninth Circuit Court of Appeals in Kennerly v. United States, 712 F.2d 1252 (9th Cir. 1983) noted that individual tribal

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[11] Had Ms. Sulcer been a federal employee the provisions of 5 U.S.C. § 551 et seq. and 5 U.S.C. § 701 et seq., which are the embodiment of the Administrative Procedure Act, would have been available to her. Not withstanding, Ms. Sulcer was paid by federal funds through indirect costs allotments; she was entitled to due process.

defendants "do not have the same immunity as the tribe itself". The Ninth Circuit also concluded that tribal court under the ICRA was the proper forum. 712 F.2d at 1259.

The Tribe is subject to the same limitations and restraints as those which are imposed on the United States Government by the Constitution. The Ninth Circuit Court of Appeals addressed the ICRA in Randall v. Yakama Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) and noted that the ICRA was designed "to transmit federal constitutional protection to those individuals subject to tribal jurisdictions". 841 F.2d at 899.

This Courts recent decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe of Oklahoma, 111 U.S. 905 (1991) specifically notes that individuals or officers of the tribe are not liable for damages. 111 U.S. at 912. See Ex parte Young, 209 U.S. 123 (1908). Justice Stevens in his concurring opinion stated:

> In my opinion all governments - federal, state and tribal- should generally be accountable for their illegal conduct...
>
> My purpose in writing separately is to emphasize the Courts holding in effect rejects the argument that this government -the tribe- is completely immune from legal process. 111 U.S. at 913.

The ICRA was designed to limit the unbridled and unchecked power of tribal officials, not simply to provide some nebulous rhetoric that has no true meaning especially for those tribes who are now increasingly entering into commerce and employing both Indian and non-Indian citizens who expect their basic constitutional rights to be observed.[12]

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[12] Justice Pitchlynn noted in his dissenting opinion the purpose of the laws and regulations that had been passed to avoid such actions alleged by Ms. Sulcer. The tribe's ventures included "a multi-million-dollar-bingo enterprise, the ownership and operation of a golf-course, and the purchase of the majority interest in a local bank". (Pet. App. A-61)

III. THE DOCTRINE OF SOVEREIGN IMMUNITY CONFLICTS WITH CONGRESSES INTENDED LIMITS ON THE ABILITY OF THE TRIBES TO GOVERN THEMSELVES.

The adoption of the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 et seq. reflects Congresses' intention to guide tribal organizations and operations. 25 U.S.C. § 450f. The Tribe pursuant to 25 U.S.C. § 450h (1), adopted a Personnel Policy manual (Pet. App. D) establishing a codified personnel system governed by a Tribal Administrator. The Personnel Policies are required as a condition of funding by funding agencies. Specifically, 25 CFR § 275.15(a) and § 271.15 (c)(5)(i) and § 271.15(c)(6)(i)(a) govern that the adoption of a personnel policy manual is required. Ms. Sulcer could reasonable expect that the respondents would adhere to such federal requirements similar to those now applicable

to the federal government.[13]

The individual respondents are not immune for violation of federal requirements that apply to tribal government. To allow tribal officials to act under the cloak of sovereign immunity within the tribes own forum allows all such actions to go unchecked in the absence of any meaningful recourse.

The Tribal Constitution incorporated the provisions of 25 U.S.C. § 1302 (8) at Article 16, sub-section (h), stating that the tribe shall not:

> Deny to any person within its jurisdiction equal protection of its laws or deprive any person of liability or property without due process of law. (Pet. App. A-97)

This Courts decision in Oklahoma Tax Commission v. Potawatomi Tribe, 111 U.S. 905 (1991), specifically noted:

> We have never held that individual

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[13] Federal employees must comply with appropriate federal regulations and/or 5 U.S.C. § 551 et seq. and 5 U.S.C. § 701 et seq.

> agents or officers of a tribe are not liable for damages in actions brought by the State. See Ex parte Young, 209 U.S. 123 (1908), 111 U.S. at 912.

Justice Stevens in his concurring opinion stated that all governments, including tribal, should be accountable and the tribe is not completely immune from legal process. 111 U.S. at 913.

The concept of sovereign immunity as thus far applied denies Petitioner any forum to bring an action against tribal officials for violations of equal protection and due process rights. Continued adherence to such a concept will allow tribal officials to violate such protected rights of any citizen, Indian or non-Indian. Petitioner did not relinquish any of her constitutional rights by being an employee of a tribe.

Implicit in the statutes and regulations is the concept that tribal government must comply with its constitution, tribal resolutions and administrative procedures;

all of which in this instance provided requirements for some notice and opportunity to be heard. This Court delineated the basic rights due a public employee in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). The Federal regulations requiring establishment of a personnel plan encompasses those concepts as required by this Court in Loudermill. Sovereign immunity as applied in this case completely negates those concepts and allows tribal officials to do what no state or federal official can - **'violate constitutionally protected rights of citizens'** at will.

Petitioner assents that Congress did not intend that tribal officials could act without recourse in any forum. As Justice White noted in his dissenting opinion in Santa Clara v. Martinez, 436 U.S. 49 (1978):

> My reading of the statute and the legislative history convinces me that Congress did not intend to deny a private cause of action to enforce the rights granted under §

1302. 436 U.S. at 74.

Nor should tribal officials be allowed to recruit non-Indian employees and subsequently deny their rights conferred by citizenship solely because they are employees of the tribe.

As the Ninth Circuit Court of Appeals noted in its opinion in Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977), Congressional intent was to impose the same due process limitations and requirements on tribal governments as are applied to the United States. 564 F.2d at 364.

Sovereign immunity when claimed by tribal officials within the tribal court systems completely undermines the purpose and effect of the ICRA. The passage of the ICRA is an excepting provision designed to protect self-determination and autonomy by avoiding self-destruction. What is painfully clear is the ICRA's designed purpose to prevent the arbitrary and unjust actions by tribal

officials is lost through the constant abuse of the immunity concept.

This Court acknowledges an important exception exists under the doctrine of immunity when explaining that an officials unconstitutional acts are not those of the government. As the government cannot justify or condone any such act, the official is without immunity protection. Pennhurst State School and Hospital, et al. v. Halderman, et al., 465 U.S. 89, 102 (1984).

Ms. Sulcer has been denied access to the front door of the courthouse in any forum to present her evidence and claims due the improper interpretation of sovereign immunity. There is no logical legal rationality to justify the enforced abrogation of constitutionally protected rights for the sole reason that Ms. Sulcer worked for an Indian tribe.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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